90-1193

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Supreme Court, U.S.
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No.: _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1990

JOHNNY C. COOKSEY,

Petitioner,

v.

ELLIS H. ABRAMS OF
HUDSPETH & BENEDICT LAW FIRM AND
THE LAW FIRM OF HUDSPETH & BENEDICT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Petitioner Proceeding Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court departed from the accepted and usual course of judicial proceedings, as to call for this Court's power of supervision?

2. Whether the district court was clearly erroneous in holding that a state judgment barred this federal lawsuit, with full knowledge that the judgment, stating with prejudice, was an error by the draftsman, and was filed for the sole purpose of dismissing the state complaint and refile that complaint in federal court, seven days later within state and federal law?

3. Whether the district court was clearly erroneous in holding that private attorneys conspiring with state officials to deprive petitioner of his constitutional rights secured under the Fourteenth Amendment, fails to state a claim upon which relief may be granted for purposes of 42 U.S.C. § 1983?

4. An important federal question, that has not, but should be settled by this Court, is whether an attorney representing and performing all functions for a creditor be held liable as the "creditor" pursuant to 15 U.S.C. § 1691(a)(3)? If not, what would be the solution, and who is to be held liable under 15 U.S.C. § 1691 et. seq., under these particular circumstances?

5. Whether the district court abused its discretion in granting Rule 11 sanctions for cost and attorneys' fees against the pro se petitioner, when the pro se petitioner was, in good faith, attempting to vindicate his valid claims?

LIST OF OTHER INTERESTED PARTY

Old Stone Credit Corporation of
Jacksonville, Florida

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ORDERS BELOW TO BE REVIEWED

The Orders of the U.S. District Court for the Northern District of Georgia, entered on June 9, 1989 and August 15, 1989 are set out in the Appendix at pages 1-11.

The Orders of the U.S. Court of Appeals for the Eleventh Circuit, entered on August 16, 1990, affirming the district court's decisions, and the October 24, 1990 order denying petitioner's request for rehearing are set out in the Appendix at pages 12-13.

JURISDICTION

The U.S. District Court for the Northern District of Georgia had jurisdiction, pursuant to 28 U.S.C. § 1331.

The U.S. Court of Appeals for the Eleventh Circuit had jurisdiction, pursuant to 28 U.S.C. § 1291.

The U.S. Supreme Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amendment 14.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

42 U.S.C. § 1983.

"It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction because the application has in good faith exercised any right under this chapter."

15 U.S.C. § 1691(a)(3)

STATEMENT OF THE CASE

On May 20, 1988 petitioner filed suit in the State Court of Fulton County to redress injuries caused by the respondents' negligence and fraudulent handling of a residential mortgage closing.

Service of process was made properly on the respondents on May 25, 1988, in accordance with Georgia law. A proper answer and counterclaim was properly filed within the required time by law by the respondents.

The state lawsuit was necessitated because the respondents refused to turn-over loan proceeds to petitioner after the three day recision period had ended, and the Confirmation Agreement had been signed.

The respondents claimed that the lender, Old Stone Credit Corporation of Jacksonville, Florida (hereinafter "OSCC"), had instructed them to withhold the funds. The record does not support this claim by the respondents.

The respondents, after the three day recision period, attempted to force petitioner to sign new loan documents, pre-dated for the date of the closing. These new loan documents changed the entire complexion of the loan. The petitioner refused to sign these new, pre-dated loan documents, and the respondents withheld the loan proceeds, and only when petitioner refused, did the issue arise concerning OSCC's instructions.

OSCC sent petitioner a "thank you" letter, as well as, a payment coupon booklet, and forwarded the loan proceeds to the respondents. This was evident with the existence of a check payable to petitioner on the day petitioner signed the Confirmation Agreement.

The petitioner also filed, against the respondents, a Memorandum of Complaint (hereinafter "MOC") in the State Bar of Georgia.

Petitioner filed the necessary evidence to support the MOC. This evidence was filed without fear of the respondents gaining access, inasmuch as the State Bar Rules & Regulations specifically stated that nothing in regards to the State Bar's action would interfere with any legal action, with regard to petitioner's complaint. Further, the Rules & Regulations governing the State Bar was comprised of procedural protection devices for the protection of the petitioner's rights.

The first protection device was Rule 4-202 (shown in the Appendix at page 18) to protect the initial screening process by the General Counsel of the State Bar, provided that if the MOC was valid his first procedure was to submit it to the Investigative Panel of the State Bar, and if the complaint was not valid it would be dismissed by the General Counsel, and further stated that nothing in reference to the dismissal would

interfere with the pending civil case.

The second protection device under Rule 4-203 (shown in Appendix at page 19) provides that the Investigative Panel, upon receipt of a valid MOC, would reframe the charges and before those charges were to be presented to the respondents, verification would have to be given by the petitioner. Never at any time does the State Bar Rules & Regulations provide for anyone within the State Bar to turn-over to the respondents the original MOC with supporting evidence.

But this is exactly what was done, and was done so by Mr. Paul B. Cohen, Assistant General Counsel of the State Bar (hereinafter "Cohen").

The actions of the State Bar did not end here. The record supports a conspiracy theory between officials of the State Bar and the respondents in this case.

The conspiracy began when the State Bar sent the petitioner a letter informing

petitioner of the procedures to be followed by the State Bar involving the MOC, prior to any procedures being carried out.

The specific instructions in the letter detailed precisely the illegal act performed by Cohen, and these instructions and actions were arbitrary to what the law provided.

Cohen continued this conspiracy by personally writing the petitioner informing him that he was carrying out the procedure stated in the first letter received by petitioner. The conspiracy "mushroomed" when the respondents' counsel mailed petitioner a letter cautioning him on any action taken with the State Bar. This letter, signed by the respondents' counsel, was dated prior to Cohen's letter informing petitioner that he was sending the MOC and the evidence to the respondents.

The dates of these two letters supports the fact that contact, and a meeting of the

minds, had taken place between the respondents and State Bar officials, prior to Cohen notifying petitioner of his action, which is in violation of State Bar Rules & Regulations.

This evidence obtained by the respondents was later used to prepare fraudulent affidavits by their associates and themselves to counteract petitioner's complaint and evidence, in support of a motion for summary judgment, filed by these respondents in State Court of Fulton County on February 9, 1989.

The petitioner, taking under consideration the unconstitutional hearing held on February 8, 1989 between petitioner and Cohen and the State Bar, chose to dismiss the complaint in state court, inasmuch as no action had been taken by the state court. This dismissal was done properly and legally under O.C.G.A. § 9-11-41(a) (shown in Appendix at page 16).

Petitioner then recommenced the lawsuit in the U.S. District Court for the Northern District of Georgia predicating claims in federal court against the respondents for conspiring with state officials to deprive petitioner of his constitutional rights secured under the Fourteenth Amendment, U.S.C., and converted the negligence claim to a 15 U.S.C. § 1691(a)(3) claim, because it was grounded in the identical factual circumstances. This was done within state law under O.C.G.A. § 9-2-61(a) (shown in Appendix at page 17).

The only negative issue about the dismissal on state level and recommencing in federal court was the voluntary dismissal was drafted, in error, using the term "with prejudice" for "without prejudice." This negative fact was specifically pointed out to the district court by the petitioner.

Georgia law provides for mistakes in law by the draftsmen or agents under

O.C.G.A. § 23-2-23 (shown in Appendix at pages 17-18), and will make the correction to conform with the record and the true intentions.

Petitioner informed the district court that the record would support petitioner's contention and true intentions. This was evident to the district court in one document, being a letter from the petitioner to the respondents, seven days before dismissal informing the respondents that the petitioner's intentions were to dismiss the state suit, due to their illegal actions with the State Bar officials, and would be predicating claims in federal court under 42 U.S.C. § 1983.

Petitioner also gave the respondents six days to respond to the letter, the respondents failed to respond. The state complaint was voluntarily dismissed and recommenced in federal court on the seventh day.

The respondents filed an answer and counterclaim within the required time by law upon receipt of proper service.

During the proceedings, the respondents filed a motion for summary judgment on the grounds that this subsequent federal complaint had been totally litigated and adjudicated on the merits in state court, and was now barred under the doctrine of res judicata, and the 42 U.S.C. § 1983 claim, that should have been raised in state court, was now barred under the same doctrine.

The petitioner responded to the summary judgment and reitterated the issue concerning the error in the dismissal to the district court.

On May 27, 1989 petitioner received five court orders, dated May 24, 1989, from the district court ordering petitioner to appear in court on June 2, 1989 at 1:30 p.m. to argue 20 issues within five different cases with four judicial days notice

to prepare, with 3½ hours allotted, opposing five different attorneys.

On June 2, 1989 petitioner appeared at the hearing and objected to the district court ordering the hearing in that manner and argued that the cases were too important to him to attempt to argue in that length of time, and further informed the district court that he was not prepared to argue five cases.

The true purpose of the hearing became evident when the district court ignored the objections and proceeded to intimidate petitioner with his rude and sarcastic remarks, asking petitioner to give his claims, and once the claims had been stated the district court's reply each and every time was "we are digressing let's move on."

The district court spent most of its time fact finding and prosecuting the case for the respondents.

When the hearing was over, as well as, the proceedings, the district court had determined that the petitioner had no claims in any of his five cases, and all the lawsuits were totally frivolous, taxed Rule 11 sanctions against petitioner in all five cases and granted injunctive relief in one of the five cases, exposing of the cases in their entirety.

Before petitioner could successfully file this case, petitioner learned that the entire files for this case, original and duplicate, were criminally removed from the custody and control of the district court clerk's filing room in violation of 18 U.S.C. § 2071 for at least two weeks. Beside this case, petitioner had two other cases, entire records (original and duplicate) criminally removed from the district court clerk's filing room.

Also, the purchase order was fraudulently mishandled, and a fact that two

different and separate transcripts were transcribed by the court reporter and filed with the clerk of the district court, and both were alleged to be fraudulent from beginning to end.

Even when petitioner attempted to make the record conform to the truth, pursuant to Federal Rule of Appellate Procedure 10(e), at the instructions of the Eleventh Circuit, the district court denied petitioner the opportunity to do so without a hearing or any responses from the opposing parties in the June 2 hearing.

On July 7, 1989 petitioner filed notice of appeal to the Eleventh Circuit Court of Appeals. On August 16, 1990 the Eleventh Circuit Court of Appeals affirmed, without opinion, the district court's decisions (shown in Appendix at page 12), and on October 16, 1990 the Eleventh Circuit denied petitioner's request for a rehearing (shown in Appendix at page 13).

Petitioner now properly files for a Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit to this Court pursuant to 28 U.S.C. § 1254(1).

ARGUMENT

Pursuant to U.S. Supreme Court Rule 10(a) "... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The petitioner will show that the district court's actions were seriously outside of any acceptable judicial proceeding, and would be held to be unconstitutional from beginning to end, and would definitely be in violation of the petitioner's rights guaranteed under the Fourteenth and Fifth Amendments of the U.S. Constitution.

The district court was not faced with a single issue that should have caused any

difficulty or problems, whatsoever. There was not, and still is not, any legal justification for the district court's findings and conclusions.

The first issue in dispute, confronted by the district court, was the raising of a foreign judgment from a state court to bar this subsequent action, along with petitioner's plea as to the error in the notice of dismissal.

The district court's solution to this issue could have been as simple as accepting an error to be an error, or applying the law and legal principles to determine whether the plea of error was indeed an error, or the district court could have applied the facts in the case to the legal principles under the doctrine of res judicata, and found, without any trouble, that this case had not been litigated and adjudicated on the merits in state court.

What the district court chose to do was everything but what it should have done. The district court ordered petitioner to court on such a short notice to perform the impossible, but one need only to have been present to realize that petitioner did not need anymore time to prepare for what the district court had in mind.

The district court did what would shock the conscience, and that was to intimidate, oppress and ignore valid claims, as well as, the law. During the process of doing nothing right, the district court misapprehended the facts and merits of the case, and those facts and merits are as follows.

First, O.C.G.A. § 9-11-41(a) was created to give a plaintiff a second chance when faced with a contrary verdict or other untenable positions, despite the inconvenience and irritation to the defendants. Griggs v.

Columbus Bank & Trust Co., 188 Ga.App. 741, 374 S.E.2d 347 (1988).

Secondly, O.C.G.A. § 9-2-61(a) sets the standards for recommencing a lawsuit, and petitioner was within that state law. Hornsby v. Hancock, 165 Ga.App. 543, 301 S.E.2d 900 (1983); also see Hudnall v. Kelly, 388 F.Supp. 1352 (NDGa. 1975).

Thirdly, the defense of res judicata must be "sustained by proof clearly showing identity of parties and cause of actions together with a valid judgment." Uddyback v. George, 223 Ga. 311, 154 S.E.2d 577 (1967).

It is settled law in this state, that all these elements must concur. Lewis v. Price, 104 Ga.App. 473, 122 S.E.2d 129 (1961); also see Firestone Tire & Rubber Co. v. Pinyan, 155 Ga.App. 343, 270 S.E.2d 883 (1980).

There were two serious problems with the district court accepting the respon-

dents' defense of res judicata. The first was that an additional cause of action had been raised, and secondly, and most important of all, there was no adjudication on the merits, which is in conformity with O.C.G.A. § 9-11-41(a) and O.C.G.A. § 9-2-61 (a). Brooks v. Douglas, 154 Ga.App. 54, 267 S.E.2d 495 (1980).

The district court and the respondents were not justified in making the voluntary dismissal a valid judgment on the merits, simply because of the error in the term "with prejudice."

It was held that the "first voluntary dismissal under subsection (a) of this section is always without prejudice, and does not operate as an adjudication of the merits." Piper v. Piper, 139 Ga.App. 19, 227 S.E.2d 842 (1976).

Another set of facts and merits of this case that the district court misapprehended was concerning the statutes and legal prin-

ciples in determining whether the error was, indeed, an error and those facts and merits are as follows.

First, the district court had been informed of the error more than once, and was directed to the letter in the record, in which, petitioner had mailed to the respondents seven days prior to recommencing the state suit in federal court.

O.C.G.A. § 23-2-23 provides for relief in equity. Sheldon v. Hargrose, 213 Ga. 672, 10 S.E.2d 898 (1957).

Even if the district court could have called this notice of voluntary dismissal a judgment, it has been held that "although a verdict may not be explicit or definite in its terms, if its intent is apparent from the pleadings and evidence, it must be construed with reference thereto." Carlson v. Holt, 152 Ga.App. 95, 262 S.E.2d 508 (1979).

The district court had no intentions of adjudicating the claims in this case, because

the defense of res judicata was a fallacy. The district court found that the prior state judgment barred this present federal case on the doctrine of res judicata. This finding was not grounded in law or fact, and is not justifiable under any set of circumstances.

The district court was in possession of enough documentation to rule on the merits of this case, concerning both claims.

The § 1691(a)(3) claim was set out as clear as a trier of fact could ask for, in order to determine whether the respondents' actions were prohibited under § 1691(a)(3).

Secondly, the 42 U.S.C. § 1983 claim was also "picture perfect," not only to state a claim for purposes of § 1983, but to prove, as well.

But the district court chose to dispose of the claims, in their entirety based on a fallacy, rather than deal with the allegations in this complaint.

Petitioner alleged in averment # 17 of his complaint that:

> "Defendants are charged with violating plaintiff's "fundamental right" to Equal Credit Opportunity, pursuant to Subchapter IV, Chapter 41, Title 15 of the U.S. Constitution, by failing to complete the transaction, as agreed on February 8, 1988, between plaintiff and lenders (ASMC and OSCC), which defendants served as lenders' legal representative."

The district court stated in the June 9th order that it would not reach the merits of the 15 U.S.C. § 1691 claim, nor the § 1983 claim, and further stated that it doubted whether the attorneys could be held liable under Section 1691.

This issue is now before this Court, and requires a resolution.

Petitioner took this action against the respondents because they were the legal representatives of the lender, OSCC, and there was nothing in the records that would support wrong-doings by the lender. But, the record was clear on the tortious and

illegal acts by the respondents.

Under Georgia law, a client cannot be held liable for illegal acts of his attorney. Plant v. Trust Co., 168 Ga.App. 909, 310 S.E.2d 745 (1983).

This same court held that "it is a cardinal rule of law that one cannot plead fraud against A because B has misled or taken advantage of him." Johnson v. Durrence, 136 Ga.App. 439, 442, 221 S.E.2d 652.

The respondents have argued that they were not representing petitioner during the closing, and owed no duty to petitioner, and was bound to follow the instructions of the lender. The problem with this is that the respondents were the legal minds in this matter and knew or should have known that their actions constituted fraud, and under Georgia law an attorney may be sued by an

adversary of his client for fraud. Guillebeau v. Jenkins, 182 Ga.App. 225, 355 S.E.2d 453, 458 (1987).

It is also irrelevant whether the respondents were representing petitioner during the closing. The respondents owed petitioner a duty not to engage in fraudulent or malicious conduct. Allied Financial Services, Inc. v. Easley, 676 F.2d 422, 423 (10th Cir. 1982).

This duty arose from the professional relationship between petitioner and the respondents. Flintkote Co. v. Dravo Corp., 678 F.2d 942, 949 (11th Cir. 1982).

Petitioner has introduced sufficient evidence in this case to create a solid issue of fraud against these respondents. Leachman v. Cobb Dev. Co., 229 Ga. 207, 209, 190 S.E.2d 537.

This issue could be resolved by taking a step not reached by the District of

Columbia Circuit in the case of Markham v. Colonial Mortg. Serv. Co., Associates, 605 F.2d 566, 571 (1979, concerning the "other defendants" in the case.

> "The district court based its judgment on alternative grounds, holding first that these defendants had done nothing which could be construed as a discriminatory act, and second, that regardless of their actions they were not "creditors" as that term is used in the Act. We affirm on the first ground, thus we do not reach the second. There is no indication that these defendants participated in Illinois Federal's decision to discriminate or in any way benefited therefrom."

This present case differs directly on points, inasmuch as, first, these respondents were the legal representatives of the out-of-state creditor and totally responsible thereto.

Secondly, the respondents would have increased their profits with the brokerage firm, if they had been successful in getting petitioner to sign new loan documents.

Thirdly, the record will support illegal and fraudulent conduct by these respondents, that will constitute discrimination pursuant to § 1691(a)(3) and Regulation B promulagated thereunder.

Petitioner alleged in averment # 19 of his complaint, in pertinent part:

> "Defendants are charged with the "deprivation of rights" under "color of state law" by depriving plaintiff of his common-law right to liberty and to pursue certain actions without interference, pursuant to ... the Fourteenth Amendment of the U.S. Constitution."

The term "conspiracy," was missing from the allegation, but was stated in court during the June 2 hearing, and throughout the pleadings. The respondents have never responded to this issue.

The respondents conspired with Cohen and the State Bar to deprive petitioner of his liberty interest to pursue his remedy through his access to courts, pursuant to O.C.G.A. § 9-2-3 (shown in Appendix at page

14), and Article 1, § 1, Paragraph 12, Georgia Constitution (shown in Appendix at page 14).

These two interests constitute a fundamental right. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113.

This fundamental right is a right that petitioner is entitled to, and is free to exercise under O.C.G.A. § 1-2-6(a)(8) (shown in Appendix at page 14), without state interference.

> "A person's interest in a benefit is a "property interest" for due process purpose if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1976) (cited from United Steelworkers of America v. University of Alabama, 599 F.2d 56, 60 (5th Cir. 1979).

There can be no doubt in the explicit understanding in O.C.G.A. § 1-2-6(a)(8).

The respondents, in concert with state officials, deprived petitioner of this liberty interest without due process of law, inasmuch as they did not give petitioner an opportunity to defend that liberty interest before deprivation, in violation of the Fourteenth Amendment, U.S.C. and Article 1, § 1, Paragraph 1, Georgia Constitution (shown in Appendix at page 14).

> "... when protected interests are implicated the right to some kind of prior hearing is paramount ..."

Board of Regents v. Roth, 408 U.S. 564, 569-571, 92 S.Ct. 2701, 2705, 2706, 33 L.Ed.2d 548, 556, 557 (1972).

Thus, the respondents' action, with the state officials, constitutes a procedural due process claim under 42 U.S.C. § 1983, in violation of the Fourteenth Amendment, U.S.C.

Petitioner alleged in averment # 20 of his complaint, in pertinent part:

> "Defendants are charged with the "deprivation of rights" under "Color of law," by depriving plaintiff of his claim to due process property interest, pursuant to ... the Fourteenth Amendment of the U.S. Constitution."

This allegation was the result of the respondents conspiracy with state officials to deprive petitioner of his property interests, inter alia, the established state procedures within the State Bar, as well as, the Civil Practice of Georgia. Further, the allegation coincides with averment #5 in 1:89-CV-486-WCO.

This conspiracy began after petitioner proceeded with filing his MOC with the State Bar against these respondents, as well as, his evidence to support the civil action in state court against these same respondents.

The MOC specifically alleged, inter alia, fraud committed by the respondents.

State Bar Rule 4-202 stated that if the MOC alleged any wrong-doing within the rules, such as fraud, the MOC would be turned over to the Investigative Panel. Even if this MOC had not alleged a wrong-doing, the complaint could have only been dismissed, and not turned-over to these respondents, because of the implicit understanding in the rules that nothing would interfere with any other right petitioner had at law.

These respondents conspired to obtain and accept the MOC with the evidence, contrary to all State Bar Rules & Regulations.

The letter by the State Bar informing petitioner of what they wanted the petitioner to believe and understand, as well as, their contact with these respondents and their counsel, was indeed a conspiracy designed for a fraudulent purpose and to cover-up the deprivation of petitioner's guaranteed rights under the Fourteenth Amendment, U.S.C.

This act involved multiple deprivations, in regard to petitioner's liberty and property interests.

First, the petitioner had a property interest in the State Bar Rules & Regulations, based on the implicit understanding that the State Bar would protect petitioner's property interest by following their explicit rules and regulations, and not breach this agreement. Perry v. Sindermann, supra.

Mr. Justice Stewart wrote "... when protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite ..." Board of Regents v. Roth, supra.

Petitioner's "property interest" were created and their dimensions are defined by existing State Bar Rules & Regulations, which stem from Georgia state law, and these

Rules & Regulations secured petitioner's benefits and support claims of entitlement to those benefits. Board of Regents v. Roth, supra.

The respondents conspired with state officials to deprive petitioner of his property interest without due process. Further, the respondents, with state officials, by turning-over his personal property, being the evidence in his civil state case, violated due process, inasmuch as, it was done without that paramount hearing.

This deprivation further caused the deprivation of petitioner's property interest in the discovery laws, O.C.G.A. § 9-11-26(a) and O.C.G.A. § 9-11-34(a)(1) (shown in Appendix at page 15), that guaranteed the procedural protection of petitioner's legal property from these respondents, without due process of law.

This action continued to deprive petitioner of his liberty interest to have the

fundamental right to sue these respondents for injury, without the infringement of state authority, without due process of law. Ingram v. Wright, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711.

The Supreme Court of Georgia established the State Bar of Georgia as its administrative arm and created the rules and regulations governing the State Bar. Sams v. Olah, 225 Ga. 497, 501, 169 S.E.2d 790 (1969).

An agency, such as the State Bar, must be rigorously held to the standard by which it professes its actions to be judged. Securities & Exch. Com. v. Chenery Corp., 318 U.S. 80, 87-88, 87 L.Ed. 626, 632-633, 63 S.Ct. 454.

> "This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

Vitarelli v. Seaton, 359 U.S. 535, 547, 3 L.Ed.2d 1012, 1021, 79 S.Ct. 968.

This act resulted in a "four count" procedural due process claim pursuant to 42 U.S.C. § 1983, in violation of the Fourteenth Amendment, U.S.C.

The respondents were involved in the total conspiracy to deprive petitioner of his secured rights under the Fourteenth Amendment, U.S.C., as alleged in averment # 3 in 1:89-CV-486-WCO. The record will support a conspiracy between these respondents and state officials.

To show a conspiracy to violate 42 U.S.C. § 1983, petitioner must show that the respondents and state officials "reached an understanding" to violate petitioner's rights. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); also see Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

The district court was clearly erroneous in finding that the voluntary dismissal

of the prior state lawsuit barred this present action, inasmuch as the facts applied was not the truth and right of the case. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

The district court made no reference as to the insuffiency of petitioner's pro se complaint, but its statements in the June 9th order implied that it clearly understood the claims. Haines v. Kerner, 404 U.S. 519, 520-521, 92 S.Ct. 594, 595-596, 30 L.Ed.2d 652 (1972), and chose not to reach the merits based on a prior judgment.

Thus, it could not have been said, beyond doubt, that petitioner could prove no set of facts in support of his claims, which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 98, 101-102, 2 L.Ed.2d 80 (1957).

The district court, with the above facts, granted Rule 11 sanctions for cost

and attorneys' fees. This is not justifiable under these circumstances.

Further, the situation involving the criminal removal of three of five of petitioner's cases, original and duplicate, one of which was this present case on appeal, from the district court clerk's filing room; coupled with the fraudulent transcripts; fraudulent purchase order; the district court's denial of Rule 10(e) of Federal Rule of Appellate Procedure; district court intentionally misapprehending the facts and principles of law in this case; and denying petitioner's procedural due process claims and Title 15 claim; "offends a sense of justice" and "shocks the consicence."

The petitioner entered the federal district court because the Fourteenth Amendment and Fifth Amendment, U.S.C. granted him the constitutional rights to enter the court for the sole purpose of vindicating

those claims. Board of Regents v. Roth, supra. at 408 U.S. 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 560-561.

These same Amendments, further guarantees an opportunity to be heard, and that opportunity must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965).

These Amendments continued to guarantee petitioner a fair and impartial hearing. Kwong Hai Chew v. Colding, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576.

And the Amendments further protects the petitioner from a hearing conduct by a bias judge, because "a bias judge is not in conformity with due process." In The Matters of Lee Roy Murchison and John White, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623.

The Constitution of the United States must possess more power than what the petitioner found in the district court.

The petitioner attempted to redress these injuries in district court, because of a holding of this Court, which held in part "... the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power." Home Telephone Company v. Los Angeles, 227 U.S. 278, 287, 33 S.Ct. 312, 316, 57 L.Ed. 510.

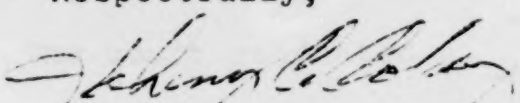
In regards to the district court's actions and conduct, it was stated by this Court that "Courts are constituted by authority, they cannot go beyond the power delegated to them; if they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities, and they are not voidable, but simply void and this even prior to reversal." Valley v. Northern F.&M. Ins. Co., 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297.

CONCLUSION

The petitioner, due to such anomalies by the district court, that affronts the conscience of a civilized society, respectfully request that his Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals be granted to review and properly rule this case for the furtherance of justice and the preservation of the U.S. Constitution.

This 24th day of January, 1991.

Respectfully,



Johnny C. Cooksey, Pro Se
Petitioner

1409 Rockcut Road
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Forest Park, Georgia 30050
Telephone: None

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. COOKSEY	CIVIL NO.
VERSUS	1:89-CV-572-WCO
ELLIS H. ABRAMS and HUDSPETH & BENEDICT LAW FIRM	FILED JUNE 9, 1989

ORDER

This case is before the court on the motion of the defendants to dismiss or for summary judgment and on the plaintiff's motions for summary judgment and to strike one statement in his motion for summary judgment and on the plaintiff's "objections" to defendants' answer. The court conducted a hearing on June 2, 1989, and heard from the plaintiff and defendants' counsel on all pending matters. Based on a careful consideration of the record and the arguments of the parties, the court finds as follows:

The plaintiff's motion for summary judgment (Docket # 4) is DENIED. The court finds that the plaintiff brought an action against

these defendants based on the same transaction as the instant case in the State Court of Fulton County. The state court action was voluntarily dismissed with prejudice by the plaintiff on March 27, 1989. Accordingly, the plaintiff's claims in the instant action are barred under the doctrine of res judicata. Allen v. McCurry, 449 U.S. 90, 94 (1980); Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982) cert. denied, 459 U.S. 1147 (1983); Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 960 (5th Cir. 1968). In regard to the plaintiff's Equal Credit Opportunity claim, the court notes that it is questionable whether a claim pursuant to 15 U.S.C. § 1691 et seq. would lie against the attorneys who handled a credit transaction. 15 U.S.C. §§ 1691(a), 1691e. The court need not reach the merits of the plaintiff's fair credit claim, however, because § 1691(c) provides that an aggrieved

credit applicant may apply to "the appropriate United States district court or any other court of competent jurisdiction" for relief under the federal Equal Credit Opportunity legislation. Thus, the plaintiff's fair credit claim, though federal in origin, could have been pleaded and heard in his state court case. Because the fair credit claim was grounded in the identical factual circumstances as the claims pleaded in his Fulton County State Court complaint, the fair credit claim should have been brought then and is now barred under the doctrine of res judicata. The court finds that far from being entitled to summary judgment, the plaintiff's complaint was frivolous, and his motion for summary judgment is denied.

The plaintiff's motion to strike one statement in his motion for summary judgment (Docket # 6) is DENIED as moot in light of the court's findings above.

The defendants' motion for summary judgment or to dismiss (Docket # 8) is GRANTED. As noted above, the plaintiff's filing and dismissal with prejudice resulted in a final judgment on the plaintiff's claims against these defendants; thus, all claims which were or could have been brought in the Fulton County State Court action, including the plaintiff's claim for damages under 42 U.S.C. § 1983, are barred under the doctrine of res judicata. Furthermore, a review of the pleadings reveals that the plaintiff failed to state a claim for which relief can be granted as he failed to allege state action as required by § 1983.

In conclusion, the court finds that the complaint filed by the plaintiff was frivolous as to both defendants. This order, denying the plaintiff's motion for summary judgment and granting summary judgment to the defendants, disposes of the plaintiff's

complaint in its entirety. The court will hear from the defendants on motions pursuant to Fed. R. Civ. P. 11 for sanctions against the plaintiff.

IT IS SO ORDERED this 9th day of June, 1989.

/s/

WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. COOKSEY	:	CIVIL NO.
VERSUS	:	1:89-CV-572-WCO
ELLIS H. ABRAMS and HUDSPETH & BENEDICT LAW FIRM	:	FILED AUGUST 15, 1989

ORDER

This case is before the court on the motion of the defendants for attorneys' fees and sanctions pursuant to Rule 11. After conducting a hearing on all pending matters in five cases filed by the plaintiff on June 2, 1989, the court granted the defendants' motion to dismiss and denied the several motions of the plaintiff, including a motion for summary judgment. The court found that the complaint filed by the plaintiff was frivolous as to all defendants. Order, June 9, 1989. Judgment was entered in the defendants' favor, and the action was dismissed, on June 9, 1989, and the plaintiff filed a notice of appeal from the judgment

on July 7, 1989.

No response was filed as to the defendants' motion for Rule 11 sanctions. See, LR 220-1(b)(1), NDGa. Rule 11 authorizes the court to impose appropriate sanctions when a pleading is not "well grounded in fact and ... warranted by existing law." Fed. R. Civ. P. 11. The standard for testing conduct under Rule 11 is "unreasonableness under the circumstances." Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987). Before a party can be subjected to sanctions under Rule 11, and thus deprived of his property, he must be accorded due process and given an opportunity to respond to the invocation of Rule 11 and to justify his actions. Id.

In Sunn v. Dean, 597 F.Supp. 79 (N.D. Ga. 1984) (Forrester, J.), a pro se plaintiff was sanctioned under Rule 11 for filing a civil rights action in federal court after a case he filed in state court

based on the same claim resulted in a judgment against him. The court held that it lacked subject matter jurisdiction to review a state court judgment and found that the suit was patently frivolous.

Similarly, in the court's June 9 order in the instant case, the court found that the plaintiff's complaint was entirely frivolous from its inception and failed to state a claim under 42 U.S.C. § 1983. The court further found that the plaintiff's complaint was barred under the doctrine of res judicata due to the dismissal with prejudice of the identical claims in the State Court of Fulton County. Furthermore, the majority of the motions filed by the plaintiff lacked any legal or factual basis as well. Giving due consideration to his pro se status, the court finds that the plaintiff's conduct was not reasonable under the circumstances, and the movants are accordingly entitled to prevail on their motion for sanctions pursuant

to Rule 11. The court finds that the extensive hearing held in the plaintiff's pending cases on June 2, 1989, satisfied the plaintiff's right to due process under Donaldson.

The movants submitted an affidavit and other documentation of the attorneys' fees they incurred in defending this frivolous action showing attorneys' fees and expenses totalling $4208.48. The affidavit submitted by attorney H. Lane Young reflects that he charges an hourly fee of $100.00 for his services and that attorney Thomas F. Wamsley, Jr., charges an hourly fee of $85.00. The defendants incurred attorneys' fees in the total amount of $3786.00 in their "defense of the above-captioned case and the bringing of the instant motion" for sanctions and expenses in the amount of $422.48. The court will deduct two hours at the lower hourly rate for preparation of the motions for sanctions, reducing the total requested by

$170.00. The court finds that the hourly rates, time expended and expenses incurred were otherwise reasonable and necessary. Accordingly, the movants' motion for sanctions pursuant to Rule 11 is GRANTED in the amount of $4038.48.

Finally, the court recently received the "Appellant's Objections to the Transcript of the June 2, 1989 Hearing in the U.S. District Court, N.D. Ga" wherein the plaintiff claimed that the transcript prepared by the court reporter was incomplete and fraudulent. The court reporter prepared a true and accurate record of the June 2 hearing, and the plaintiff's objections are accordingly DENIED.

In conclusion, the motion of defendants for sanctions pursuant to Rule 11 is GRANTED, and the plaintiff is ordered to pay movants the amount of $4038.48. The clerk is directed to enter judgment in the

movants' favor in that amount. The plaintiff's objections to the transcript of the June 2 hearing in this case are DENIED.

IT IS SO ORDERED this 15th day of August, 1989.

/s/

WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8560
Non-Argument Calendar

D.C. Docket No. 1:89-CV-572-WCO

JOHNNY C. COOKSEY,

Plaintiff-Counterclaim Defendant/
Appellant,

versus

ELLIS H. ABRAMS, of Hudspeth &
Benedict Law Firm, HUDSPETH &
BENEDICT LAW FIRM,

Defendants-Counterclaim Plaintiffs/
Appellees.

Appeal from the United States District Court
for the Northern District of Georgia.

(August 16, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8560
Non-Argument Calendar

D.C. Docket No. 1:89-CV-572-WCO

JOHNNY C. COOKSEY,

Plaintiff-Counterclaim Defendant/
Appellant,

versus

ELLIS H. ABRAMS, of Hudspeth &
Benedict Law Firm, HUDSPETH &
BENEDICT LAW FIRM,

Defendants-Counterclaim Plaintiffs/
Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING
(FILED AUGUST 31, 1990)

(OCT 16, 1990)

BEFORE: FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Johnny C. Cooksey, is denied.

ENTERED FOR THE COURT: /s/ Phyllis Kravitch
United States Circuit Judge

GEORGIA CONSTITUTION AND STATUTES

Article 1, § 1, Paragraph 1 provides "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, § 1, Paragraph 12 provides "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."

O.C.G.A. § 1-2-6(a)(8) provides "The rights of citizens include, without limitation, the following: ... (8) The right to perform any civil function; ..."

O.C.G.A. § 9-2-3 provides "For every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."

O.C.G.A. § 9-11-26(a) provides "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subsection (c) of this Code section, the frequency of use of these methods is not limited."

O.C.G.A. § 9-11-34(a) provides "Any party may serve on any other party a request: (1) To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents ..., or to inspect and copy, test or sample any tangible things which constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26 and which are in the possession, custody, or control of the party upon whom the request is served; ..."

O.C.G.A. § 9-11-41(a) provides "Subject to the provisions of subsection (c) of Code Section 9-11-23, of Code Section 9-11-66, and of any statute, an action may be dismissed by the plaintiff, without order or permission of court, by filing a written notice of dismissal at any time before the plaintiff rest his case. After the plaintiff rests his case, permission and an order of the court must be obtained before dismissal. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. A dismissal under the subsection is without prejudice, except that the filing of a third notice of dismissal operates as an adjudication upon the merits."

O.C.G.A. § 9-2-61(a) provides "When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or, if permitted by the federal rules of civil procedure, in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later, subject to the requirement of payment of costs in the original action as required by subsection (d) of Code Section 9-11-41; provided, however, if the dismissal or discontinuance occurs after the expiration of the applicable period of limitation, this privilege of renewal shall be exercised only once."

O.C.G.A. § 23-2-23 provides "A mistake of law by the draftsman or other agent, by which the contract, as executed, does not

fulfill or violates the manifest intention of the parties to the agreement, may be relieved in equity."

State Bar Rule 4-202(c) provides "Upon completion of its screening of a complaint, the Office of the General Counsel shall be empowered to dismiss those complaints which are unjustified, frivolous, patently unfounded or which fail to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia; provided, however, that a rejection of such complaint by the Office of the General Counsel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent. Those complaints which appear to allege any violation of Part IV, Chapter 1 of the State Bar Rules shall be forwarded to the Investigative Panel according to procedures established by such Panel in its rules of conduct and procedure."

State Bar Rule 4-203 provides "In accordance with these rules, the Investigative Panel shall have the following powers and duties: (1) to receive and evaluate any and all written complaints against members of the State Bar and to frame such charges and complaints as shall conform to the requirements of these rules. A copy of any complaint serving as the basis for investigation or proceedings before the Panel shall be furnished by mail to the respondent. Each complaint received by the Panel, other than those initiated by the Supreme Court or the Panel, shall be verified by the complainant before serving as the basis of proceedings before the Panel: ..."